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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1993

No. _____

F.J. VOLLMER & COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government may premise criminal liability solely on the basis of the violation of a substantive administrative agency rule which the agency adopted through a private side agreement and not in accordance with the rulemaking requirements of the Administrative Procedures Act.

2. Whether in the face of the plain language of the statute and express congressional intent to the contrary, the Seventh Circuit erred in finding that in delegating to the Bureau of Alcohol, Tobacco and Firearms the authority to regulate the importation of firearms, Congress impliedly delegated the authority to regulate the domestic sale or transfer of firearms.

LIST OF PARTIES

The parties to the proceedings below were Petitioner, F.J. Vollmer & Company, its co-defendants Robert W. Vollmer, Kenneth L. Nevius, Dana R. Hales and James B. McCabe, and the Respondent, the United States of America. F.J. Vollmer & Company has no parent or subsidiary.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, F. J. Vollmer & Company, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-titled proceeding on July 30, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. F.J. Vollmer & Company*, 1 F.3d 1511 (7th Cir. 1993), and is reprinted in the appendix at A-1. The opinion of the district court is reported at *United States v. Nevius*, 792 F. Supp. 609 (C.D. Ill. 1992), and is reprinted at A-21.

STATEMENT OF FACTS

I. F.J. Vollmer & Company

Petitioner, F.J. Vollmer & Company, a federal firearms licensee since 1975, has been in the business of buying and selling firearms, coins, bullion, and other collectibles since 1965. While it is based in Bloomington, Illinois, it is an established national firearms dealer with sixty percent of its transactions occurring with other dealers throughout the United States. Through mail order and advertising, the business has a nationwide market. In the course of an average day, F.J. Vollmer & Company is involved in 25 to 40 firearms transactions. F.J. Vollmer & Company enjoys a reputation throughout the industry as an honest and law-abiding company.

II. The Ban on the Importation of Steyr AUG-SA Rifles

Through the Gun Control Act of 1968, Congress granted the Secretary of Treasury the authority to regulate the importation of firearms into this county. However, beyond a series of specific prohibitions relating to certain unqualified parties such as minors and felons (*see* 18 U.S.C. § 922(g) and (h)) Congress has not regulated or criminalized the domestic sale or transfer of lawfully imported or domestically produced firearms. Under the Gun Control Act, the Secretary may ban or regulate the importation of firearms into this country, but once those firearms are lawfully imported, the Secretary lacks the general authority to regulate their subsequent sale or transfer, and qualified parties may freely sell or transfer the firearms.

On March 14, 1989, the Secretary of Treasury, Nicholas Brady, acting through the Bureau of Alcohol, Tobacco and Firearms (BATF), imposed a temporary ban on the importation of various semi-automatic rifles, including the Steyr AUG-SA. At that time, Gun South, Inc. ("GSI"), a firearms importer located in Trussville, Alabama, held valid BATF permits for the importation of Steyr AUG-SA riles, and, in fact, had already remitted payment to the Austrian manufacturer for over 1,000 rifles. While the BATF in-

itially advised GSI that the ban did not extend to firearms ordered under existing permits and that GSI would be allowed to import the firearms, the agency reversed itself, and the United States Customs Service seized the Steyr AUG-SA rifles when they arrived in the United States.

GSI filed suit against the Secretary of the Treasury in the Northern District of Alabama seeking to enjoin the government from interfering with the delivery of the firearms. The district court granted the injunction. *Gun South, Inc. v. Brady*, 711 F. Supp. 1054 (N.D. Ala. 1989). On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the district court's order, finding that the BATF was acting within its authority in imposing the temporary import ban. *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989).

Following the Eleventh Circuit's decision, the Director of BATF issued a final administrative decision finding that Steyr AUG-SA rifles were not importable under Section 925(d) of the Gun Control Act of 1968, as amended, 18 U.S.C. § 925(d). As a result, the ban on the importation of Steyr AUG-SA rifles became permanent.

The importation ban is not absolute; it only bars private parties from importing Steyr AUG-SA rifles. Government agencies such as the National Guard and local law enforcement authorities remain free to import the rifles for their official use. 18 U.S.C. § 925(a)(1). Moreover, once a government agency lawfully imports a firearm under Section 925(a)(1), the agency is not required to retain the firearm for any specific period of time, and the agency remains free to resell to third parties, subject only to the specific restrictions of 18 U.S.C. § 922.[1]

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1 Indeed, during the time F.J. Vollmer & Company purchased the Steyr AUG-SA rifles at issue in this case from Kenneth Nevius, F.J. Vollmer & Company also purchased hundreds of Steyr AUG-SA rifles directly from many other sources, including the United States Marshal's Service.

After the importation ban, qualified parties such as F.J. Vollmer & Company and GSI could buy and sell Steyr AUG-SA rifles which were imported prior to the ban.[2] The "pre-ban" rifles bore no markings or characteristics which would differentiate them from rifles imported under the ban. Further, neither the BATF nor GSI provided potentially affected parties — such as dealers, purchasers, and sellers — with notice of the nature or existence of the settlement agreement. Thus, no basis exists for F.J. Vollmer & Company or any other party to determine whether such firearms were imported before or after the ban.

III. The Federal Rule of Civil Procedure Rule 41(a) Settlement Agreement Between BATF and Gun South

On the remand of the GSI litigation from the Eleventh Circuit, GSI and BATF entered into a voluntary settlement agreement pursuant to Federal Rule of Civil Procedure (FRCP) 41(a)(1)(ii). The settlement agreement permitted GSI to take possession of the rifles on the condition that it comply with certain restrictions on the subsequent domestic sale or transfer of the firearms. This agreement was reduced to a Stipulation and Order filed with the district court in Alabama on November 9, 1989. Appendix at A-33.

Although Congress has withheld from the Secretary of Treasury the authority to regulate the domestic sale or transfer of firearms, the Settlement Agreement did just that. It provided that GSI could sell the firearms only to law enforcement officers or agencies, and only after it obtained advance written permission from BATF for each sale. To obtain that approval, each prospective purchaser had to submit a purchase order reciting that the firearms would be

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2 The Steyr AUG-SA rifles F.J. Vollmer & Company purchased from Nevius represented a small fraction of its overall purchases of Steyr AUG-SA rifles during that time frame. In that period, the company had 25 to 40 transactions in firearms a day, and over 350 Steyr AUG-SA transactions, both purchases and sales, including multiple firearm transactions with several individuals. Business in Steyr AUG-SA rifles represents less than two percent of the corporation's business.

used in the officer's official duties, as well as a certification from a supervisory official confirming that the purchaser could use the rifle in connection with his official duties and stating that the agency's policies allowed officers to carry and use personally owned firearms. Finally, the purchasing officer had to certify that the rifle was not being purchased for purposes of transfer or resale.

Although BATF and GSI filed the Settlement Agreement with the district court in Alabama, the Settlement Agreement was not published in any report of decisions, nor did either GSI or BATF provide notice to any other parties of the nature or existence of the Settlement Agreement. Petitioner F.J. Vollmer & Company, as a nonparty to the litigation, was not a party to the settlement agreement, nor was it given notice of it.

IV. Kenneth Nevius' Scheme To Purchase And Sell The Restricted Steyr AUG-SA Rifles

Kenneth Nevius was a Captain on full time active duty in the Illinois National Guard. In the summer of 1990, Nevius saw a GSI advertisement in *Shotgun News*, a trade publication, offering Steyr AUG-SA rifles for sale to law enforcement personnel at a price of $1,380. The advertisement did not state that the firearms were subject to any extralegal restrictions such as the settlement agreement. In that same publication he also came across F.J. Vollmer & Company's advertisement which set forth prices at which it would purchase various firearms, including Steyr AUG-SA rifles. The advertisement stated that F.J. Vollmer & Company would pay $2,200 for new Steyr AUG-SA rifles. Recognizing the price spread between GSI's offer to sell and F.J. Vollmer & Company's offer to purchase these firearms, Nevius contacted GSI and confirmed that, as a military officer, he was eligible to purchase a Steyr AUG-SA rifle. He then called F.J. Vollmer & Company, and confirmed that the dealership was still buying those firearms.

Having confirmed the price spread, Nevius obtained an information packet from GSI, which set forth the formats of the various documents required to accompany a purchase order. Nevius prepared the necessary correspondence on his National Guard unit's stationery to purchase two Steyr AUG-SA rifles, including a signed

statement that the firearms were being purchased in connection with his official duties and not for the purpose of resale. He then obtained the required supervisory certification from a superior officer and ordered two Steyr AUG-SA rifles. Upon receiving the firearms from GSI, Nevius travelled to Bloomington, Illinois, and sold them to F.J. Vollmer & Company for $4,800; $2,400 each.

During the next year, Nevius put together the documentation for seven additional purchase transactions from GSI. Each of these transactions followed the same format. Two rifles were ordered in the name of each guardsman who signed a purchase order and certified that the firearms were being purchased in connection with their official duties and not for resale; the guardsman received $50 to $200 as compensation. Nevius signed the required supervisory certification letter, and borrowed the purchase money from his local bank. The rifles were then shipped by way of United Parcel Service to the armory in Decatur, and, from there, Nevius transported the firearms to Bloomington and sold them to F.J. Vollmer & Company. In all, Nevius acquired a total of 60 Steyr AUG-SA rifles and 11 Steyr AUG-SA rifle receivers, which are interchangeable components that house the operating bolt and barrel of the rifle.

During Nevius' final transaction, BATF agents apprehended him with fourteen rifles and seven receivers. Nevius agreed to cooperate with BATF, and BATF recorded his conversations with F.J. Vollmer & Company employees as he completed the sale of the fourteen firearms.

VI. Indictment, Trial and Appeal

The government indicted Nevius, F.J. Vollmer & Company, Inc. and one of its employees, Robert Vollmer, for conspiracy to defraud the United States and mail fraud. 18 U.S.C. § 371; 18 U.S.C. § 1341.[3] In the indictment, the government also charged two National Guard officers who participated in Nevius' scheme by signing the GSI paperwork, Dana R. Hales (mail fraud and false statement), and James B. McCabe (conspiracy and mail fraud).

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3 The government also indicted Nevius of making false statements under 18 U.S.C. § 1001.

The original and superseding indictments were premised on the theory that Nevius used his position in the Illinois Army National Guard and made false representations to acquire the rifles from GSI, which he resold to F.J. Vollmer & Company, a federal firearm licensee and dealer located in Bloomington, Illinois, acting through its employee, Robert W. Vollmer.[4] Because Congress had withheld from BATF the authority to regulate the domestic sale of firearms, the government premised its conspiracy charge on the assertion that F.J. Vollmer & Company conspired with Nevius not to violate any provision of the Federal Code or any other law, but to defraud the government by violating the extra-legal requirements of the unpublished *Gun South* settlement agreement.

Following a jury trial, the jury acquitted Robert W. Vollmer of all six counts directed against him. The jury also acquitted Hales on all counts. The jury acquitted McCabe of conspiracy, but found him guilty of making false statements. The trial court, however, granted McCabe's motion for a new trial, and the government subsequently dismissed the charges against him.

Although the jury acquitted on all grounds the only corporate agent charged in the indictment — Robert Vollmer — the jury convicted F.J. Vollmer & Company on three counts of mail fraud and one count of conspiracy, and acquitted F. J. Vollmer & Company on two counts of mail fraud. The district court denied F.J. Vollmer & Company's post-trial motions, and, at sentencing, imposed fines totaling $20,000 on the corporation. A final conviction of conspiracy will deprive F.J. Vollmer & Company of its federal firearms license and force it out of business.

On appeal to the United States Court of Appeals for the Seventh Circuit, F.J. Vollmer & Company challenged its conspiracy conviction on the ground that the unpublished and uncodified *Gun*

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4 Hales, who was both a Major in the Guard and a federal firearms licensee, was charged with participating with Nevius in a related scheme to defraud GSI by submitting false claims for rebates under GSI's Dealer Participation Plan. McCabe was charged with using his position in the Guard to assist Nevius in acquiring the firearms.

South settlement agreement constituted a *de facto* substantive agency rule that was not promulgated in accordance with the dictates of the Administrative Procedures Act ("APA") and thus could not serve as the basis for the imposition of criminal liability. Although the APA expressly requires that administrative agencies such as BATF abide by its notice-and-comment requirements when enacting substantive rules, the Seventh Circuit held that the BATF's failure to comply with the APA was "irrelevant" because the indictment charged F.J. Vollmer & Company with violating § 371, the general federal conspiracy statute, and not with violating the terms of the settlement agreement.[5] *United States v. F.J. Vollmer & Company*, 1 F.3d 1511, 1515-16 (7th Cir. 1993).

F.J. Vollmer & Company also challenged its conspiracy conviction on the ground that BATF exceeded its congressionally delegated authority by regulating the domestic sale of firearms through the *Gun South* settlement agreement. Although it found this argument facially persuasive, the court concluded that BATF's statutory authority to regulate the importation of firearms under 18 U.S.C. § 925(a)(1) vests BATF with the "authority to regulate the transfer of a firearm from an importer to the law enforcement agency for which the firearm was imported." 1 F.3d at 1516-17. The court held that in order for § 925(a)(1) to have meaning, "some authority must exist to ensure that the exception to § 922(l) is employed only by governments or their agencies." 1 F.3d at 1516. Based on its erroneous finding that BATF had the authority to regulate the first domestic sale of the rifles, the court found that the government adequately charged F.J. Vollmer & Company with conspiring to interfere with a lawful government function.

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5 The Seventh Circuit reversed F.J. Vollmer & Company's mail fraud convictions on the ground that the government had failed to prove that F.J. Vollmer & Company defrauded the government of a property interest protected by the mail fraud statute. The Seventh Circuit also vacated the conspiracy conviction and remanded for a new trial on the ground that the district court failed to honor F.J. Vollmer & Company's timely request to poll the jury. 1 F.3d at 1522-23.

REASONS FOR GRANTING THE WRIT

The Court Should Grant the Writ to Resolve the Circuit Split on the Question of Whether the Government May Premise Criminal Liability on a Substantive Administrative Agency Rule Adopted in Violation of the Administrative Procedures Act

This Court should grant the petition for writ of certiorari because the Seventh Circuit's decision — permitting administrative agencies to establish substantive rules governing the conduct of affected parties through side agreements with private parties — conflicts with decisions of other courts of appeals and sets a dangerous precedent. Congress enacted the rulemaking requirements of the APA to ensure fairness to affected parties by guaranteeing them notice of, and an opportunity to comment upon, proposed substantive agency rules before their enactment. The Seventh Circuit's decision, if left unreviewed, would permit administrative agencies such as BATF, OSHA, EPA and others arbitrarily to promulgate rules with nationwide application, binding with the force of law, in circumvention of the safeguards of the APA. Under such a regime, the government could subject affected parties, such as it did F.J. Vollmer & Company in this case, to civil and criminal sanctions for the violation of unpublished and uncodified rules with neither prior notice of their existence nor an opportunity to comment upon their merits. Thus, the decision below, if left unreviewed, stands to jeopardize the framework within which businesses and individuals conform their daily conduct to the rule of law. Fundamental questions of administrative procedure, due process, and executive agency authority are at issue.

It is well established that Congress may delegate to an administrative agency the authority to promulgate rules and regulations to implement a duly enacted statutory scheme. However, before such rules and regulations become law and binding upon the citizenry, the agency must comply with the strict statutory requirements of the APA, which ensure that administrative agencies are confined within the scope of authority delegated by Congress

and that, to the extent they yield legislative powers, they comport with fundamental requirements of due process.

The APA mandates that an agency publish in the Federal Register notice of its intent to engage in rulemaking and that interested parties be afforded the opportunity to comment before the rules are implemented. 5 U.S.C. § 553 (1988). The Gun Control Act further limits the Secretary of the Treasury to "prescrib[ing] only such rules and regulations as are necessary to carry out the provisions of [the Act]." 18 U.S.C. § 926(a). The Secretary must give a minimum of ninety days' public notice and provide an opportunity to comment before the rules are implemented. *Id.* Agency rules that are not promulgated in strict accordance with these fundamental requirements are null and void.

These procedural safeguards, which are essential to the creation of a fair and workable regulatory scheme, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 1426 (1969), apply with particular force in a case such as this. The "APA was adopted to provide that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherent arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). The settlement agreement in the *Gun South* litigation — which served as the basis for the imposition of criminal liability on Petitioner — was just such an "unpublished *ad hoc* determination."

Courts demand strict agency adherence to the procedural requirements of the APA where, as here, noncompliance with the agency "rule" exposes the offending party to criminal liability. *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) ("[c]ertainly, a criminal prosecution founded on an agency rule should be held to the strict letter of the APA"); *United States v. Ryan*, No. 90-CR-265 (N.D. Ill. Sept. 12, 1990) ("when criminal penalties arise directly from the violation of regulations, such regulations must pass muster under the APA"); *United States v. Thompson*, 687 F.2d 1279, 1288 (10th Cir. 1982) (McKay, J., dissenting) ("[a] proper respect for the principles of lenity and caution in finding otherwise protected conduct criminal suggests, at the very least, that where doubt exists, the congressionally mandated

procedures of APA section 553 should be followed . . . . If the APA is to have any meaning, it must be strictly applied when criminal consequences are involved"). The BATF failed to comply with the APA and Section 926's notice-and-comment requirements. 5 U.S.C. § 553(b). The notice required by the APA must be "sufficient to fairly apprise interested parties of the issues involved," *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 248 (4th Cir. 1979), *rev'd on other grounds*, 449 U.S. 64 (1980), and must afford interested parties "a reasonable opportunity to participate in the rulemaking process." *Forester v. Consumer Products Safety Comm'n*, 559 F.2d 774 (D.C. Cir. 1977). The BATF provided no such notice and opportunity to comment prior to entering into the agreement to settle the *Gun South* litigation. Indeed, in the courts below the government conceded that the BATF failed to abide by the dictates of the APA. It argued, however, that the requirements of the APA do not apply to the federal district court's entry of a FRCP 41(a)(i) stipulation. While as a general proposition that may be true, it is not true when that stipulation has the effect of an agency rule which then becomes the basis for the imposition of criminal liability.

Although it did not adopt the government's clearly fallacious reasoning, the Seventh Circuit inexplicably found that the BATF's enactment of a *de facto* substantive agency rule without compliance with the APA was "irrelevant" because the government charged F.J. Vollmer & Company with conspiracy and under Section 371, and not directly with violating the terms of the settlement agreement. In the Seventh Circuit's view, the government may premise criminal liability on the obligations imposed solely by invalid substantive agency rules as long as it charges the noncompliance of such an extra-legal obligation as a violation of another federal statute.

The Seventh Circuit's "relevancy" basis for refusing to address the validity of the *Gun South* settlement agreement is a mystery. No provision of law criminalizes or otherwise imposes the requirements of the *Gun South* settlement agreement on the domestic transfer of Steyr AUG-SA rifles such as those Gun South imported, took possession of, and sold to Nevius. Therefore, the government charged F.J. Vollmer & Company with conspiring to

defraud the government by submitting to the BATF false statements mandated not by any provision of law, but only by the *Gun South* settlement agreement.

Under these circumstances, the validity of F.J. Vollmer & Company's conspiracy conviction hinges directly on the validity of the *Gun South* settlement agreement. If the settlement agreement is invalid because it was not promulgated in accordance with the APA, then the legal requirements that F.J. Vollmer & Company were convicted of conspiring to violate would not exist, and the government would have no basis for a conspiracy charge. Therefore, contrary to the Seventh Circuit's summary conclusion, the viability of the settlement agreement was directly relevant, indeed critical, to whether the conspiracy charge to defraud the government solely by violating its terms could stand.

The Seventh Circuit's reasoning, which pays blind homage to form and wholly ignores substance, constitutes a vast, impermissible, and perilous expansion of administrative lawmaking powers. The decision approves a dangerous process whereby administrative agencies may evade the congressionally imposed procedural requirements of the APA and establish binding, substantive rules governing the conduct of affected parties through unpublished side agreements with private parties. Such an unauthorized expansion of legislative powers threatens the fabric of our democratic system of government.

Review of the Seventh Circuit's decision also is necessary to resolve the conflict between the Seventh Circuit's decision and decisions of the Ninth and District of Columbia Circuits. The Ninth and District of Columbia Circuits recognize that the government cannot premise criminal liability on an invalid agency rule regardless of whether the government frames its charges under § 371 or any other provision of law. In *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986), the defendant, a suspected money launderer, on several occasions paid cash to purchase cashier's checks from various banks. Each of the checks was for less than $10,000. The government charged the defendant with aiding and abetting a bank's failure to report currency transactions as required by the Currency Transaction Reporting Act ("Reporting Act"), 31 U.S.C.

§ 5313(a), and conspiring to violate the Reporting Act under § 371. The Reporting Act requires financial institutions to file a report of certain currency transactions "at the time and in the way the Secretary prescribes." 31 U.S.C. § 5313(a). The Secretary promulgated regulations to implement this provision, one of which requires financial institutions to file currency transaction reports when they participate in transactions involving more than $10,000. 31 C.F.R. § 103.22(a).

Although the Ninth Circuit previously had recognized that the Reporting Act and regulations do not impose a duty on the participant in the transaction to inform the bank of the nature of the transaction, the government contended that the defendant conspired to violate instructions in the Currency Transaction Reporting Form 4789. The Form 4789 required the bank to treat the multiple transactions as a single transaction and to report them. The Ninth Circuit rejected the government's attempt to premise criminal liability on the Form's reporting requirements because it "was never promulgated pursuant to the rule making requirements of the APA" and thus "is not effective as a regulation." The court overturned the conspiracy and aiding and abetting convictions because "[c]riminal penalties for failure to report currency transactions can attach only upon violation of regulations properly imposed by the Secretary." 794 F.2d at 508.

Similarly, in *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989), the United States Parks Service promulgated regulations governing activities in all national capital region parks. The defendant was convicted of violating a regulation prohibiting storage in the park in an amount greater than reasonably required for a twenty-four hour demonstration. Although the defendant had received actual notice of the regulation, the District of Columbia Circuit reversed the conviction on the ground that the regulation was invalid because it was not promulgated in accordance with the APA. In contrast to the Seventh Circuit's decision in this case, the court observed that "[b]efore a person is threatened with jail for such a violation, the government must ensure that the rule itself is not in violation of the law." *Id.* at 349.

The Seventh Circuit's holding — that the procedural viability of an agency rule is irrelevant to a conspiracy charge — conflicts directly with *Reinis* and *Picciotto*'s recognition that the government cannot premise criminal liability, under Section 371 or any other provision of law, on the violation of an invalid agency rule. Review by this Court will permit it to resolve this conflict in authority and to establish definitively the parameters of administrative law-making.

The Court Should Grant the Writ to Resolve the Question of Whether BATF Has the Authority to Regulate the Domestic Sale or Transfer of Firearms Despite Express Statutory Language and Legislative History Stating That It Does Not

The Court also should grant the petition for writ of certiorari because the Seventh Circuit's decision impermissibly engrafts on to the otherwise plain terms of the Act an implied authority to regulate domestic sale or transfer of firearms and ignores express congressional intent to the contrary. Review of the Seventh Circuit's expansive interpretation of the powers Congress granted to the BATF under the Gun Control Act is necessary to establish clearly the parameters of the BATF's authority to regulate firearms in domestic commerce.

Although the Gun Control Act expressly vests the BATF only with authority to regulate the importation of firearms such as the Steyr AUG-SA rifle, the Seventh Circuit held that the BATF has the implied authority to regulate the first domestic sale of a firearm imported for government use because "in order for § 925(a)(1) to have meaning, some authority must exist to ensure that the exception to § 922(l) is employed only by governments or their agencies." 1 F.3d at 1516. The Seventh Circuit's interpretation of the scope and meaning of Section 925(a)(1) is erroneous because limiting the BATF to congressionally delegated authority does not deprive Section 925(a)(1) of its meaning. That provision permits the importation of otherwise nonimportable firearms where the firearms are for "the use of" the United States. An individual who makes false statements to the government to obtain a firearm under Section 925(a)(1) and then resells the firearm in general commerce would be subject to criminal prosecution under Section 925(a)(1) as well

as a myriad of existing laws, including making false statements to the government under 18 U.S.C. §1001. Congress therefore correctly determined that BATF does not need the authority to regulate *domestic* transfers in order to enforce the Gun Control Act's *importation* provisions.

Indeed, exercising the authority *expressly* granted to it under Sections 922 and 925, the BATF already has crafted a complex scheme of regulations to ensure that the importation restrictions are properly enforced.[6] These regulations, all properly promulgated and well within the scope of congressional delegation, are sufficient to permit the BATF to regulate effectively the importation of Steyr AUG-SA rifles. In fact, regulations relating solely to the domestic sale or transfer of imported firearms are simply unnecessary to the effective enforcement of Congress' importation laws.

Moreover, the Seventh Circuit's — and not F.J. Vollmer & Company's — interpretation of the Gun Control Act "renders meaningless" important provisions of that statute. In Section 922, Congress crafted an intricate scheme governing the domestic sale and transfer of firearms, which broadly permits the transfer of most firearms to qualified individuals, barring only sales to such unqualified parties as felons and minors. Granting the BATF the authority to regulate broadly the domestic transfer of lawfully imported fire-

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6 For instance, the Secretary of BATF has promulgated numerous regulations, in compliance with the Administrative Procedures Act, to regulate the importation of firearms under Section 925. 27 C.F.R. § 178.111 *et seq.* Section 178.112 requires that the Director approve all importations of firearms into the United States. Authorization is obtained by filing ATF Form 6 containing certain information concerning the firearm, the country from which the firearm is being imported and the importer. The BATF also requires that, for firearms being imported pursuant to Section 925(a)(1), the Form 6 application be accompanied by a purchase order from a governmental entity. The purchase order must indicate that agency funds are being expended and that the firearms will become the property of the governmental entity. ATF Rul. 80-8, A.T.F. Q.B. 20, 1980-2.

arms impermissibly renders these provisions superfluous and disrupts Congress' carefully crafted gun control scheme. *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175 (7th Cir. 1989) (where Congress explicitly enumerates certain exceptions to general prohibition, additional exceptions are not to be implied); *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983) (court should not construe statute in way that renders a provision meaningless, redundant or superfluous).

The Seventh Circuit erroneously justified its broad interpretation of the Gun Control Act on the basis that withholding the authority to regulate domestic sales from the BATF would permit government officers or departments to obtain weapons under Section 925(a)(1) and then resell the weapons in the open market. Through the Gun Control Act, Congress crafted a detailed scheme governing the importation, possession, and sale of firearms. In doing so, Congress balanced competing concerns in vesting the BATF with certain limited powers over the importation of firearms. That the agency or a court may believe that the powers that Congress granted the BATF are insufficient to accomplish Congress' intended goals or to meet other concerns is an insufficient basis for expanding an agency's powers. An agency is limited to the power granted to it by Congress. Neither a court nor an agency may broaden an agency's power beyond that granted by Congress merely because it believes that such an expansion is necessary to achieve more effectively the goals of the statute. *United States v. Calamaro*, 354 U.S. 351, 357 (1957). This Court has rejected repeatedly attempts by an agency to "rewrite the statute simply because [an agency or court] might feel that the scheme it creates could be improved upon." *Id.* at 357. *See also Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Porter v. NLRB*, 397 U.S. 99 (1970). Any argument that the power to regulate the domestic sale or transfer of Steyr AUG-SA rifles is necessary to the effective enforcement of its importation powers "should be directed to the Congress rather than to the courts." *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963)).

The Seventh Circuit's expansive interpretation of the powers Congress vested the BATF also contravenes clearly expressed con-

gressional intent to withhold from the BATF the authority to regulate the domestic sale of firearms. Congress recently considered and rejected legislation which would have granted the BATF the authority to regulate the domestic sale of assault rifles, including the Steyr AUG-SA rifle.

In July of 1991, the United States Senate proposed the Anti-Drug Assault Weapons Limitation Act of 1991 ("Assault Weapons Limitation Act"), which sought to amend Section 922 of the Gun Control Act to make it "unlawful for any person to transfer, ship, receive or possess any assault weapon." 137 Cong. Rec. S9993 (daily ed. July 15, 1991). The provision contained several exceptions, including an exception for state and federal government agencies. Current owners of such firearms acquired prior to the provision's enactment would be required to register the firearm with the BATF prior to sale or transfer, pursuant to regulations to be promulgated by the Secretary of BATF "within 90 days of enactment." The legislation defined assault weapons expressly to include the Steyr AUG-SA rifle.

The House version of the Assault Weapons Limitation Act also sought to amend Section 922 and was somewhat broader, containing a provision against possession and transfer of all "assault" weapons, including the Steyr AUG-SA rifle. The provision, which excluded individuals owning assault weapons prior to the enactment of the Act, provided that "it shall be unlawful for any person to transfer an assault weapon unless" the "transfer is in accordance with regulations prescribed by the Secretary."[7] The House provision also defined "assault weapon" to include the Steyr AUG-SA rifle.

The joint Senate/House Conference Committee adopted the House version and the Act was submitted to the House for debate.

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7 The House version further provided that "within 60 days after the date of the enactment of this subsection, the Secretary shall prescribe regulations governing the transfer of assault weapons, which shall allow such a transfer to proceed within 30 days after the Secretary may require to be submitted with respect to the transfer, and shall include provisions for determining whether the transferee is a person described in section 922(g)."

The proposed provision unequivocally would have vested the Secretary of Treasury and the BATF with the authority the settlement agreement purported to vest in the BATF — that is, the authority to regulate or prohibit the domestic possession, sale and transfer of certain types of firearms and to promulgate regulations regarding the lawful possession, sale and transfer of such firearms.

In opposition to vesting the BATF with this broad authority over the domestic transfer or sale of firearms, Congressman Volkmer (R-Mo.) proposed an amendment (the "Volkmer Amendment") to strike these provisions. The supporters of the Volkmer Amendment argued that permitting the BATF to regulate the domestic possession and transfer of firearms vested the BATF with overly broad power to determine which weapons law abiding citizens could own and sell. The House adopted the Volkmer Amendment, and the provisions empowering BATF to regulate the domestic sale or transfer of firearms and to promulgate regulations in relation to such authority were stricken. 137 Cong. Rec. H8023 (daily ed. October 17, 1991).

Congress' consideration and rejection of legislation which would have vested BATF with precisely the authority exercised in the settlement agreement compels the conclusion that Congress had not previously granted the authority to regulate the domestic sale of assault weapons to the BATF under Sections 922(1) and 925(a)(1). *Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 665 n.3 (1985) (evidence that Congress subsequently considered granting power to an agency is dispositive evidence that it had not previously granted such power); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("legislative history of subsequent legislation is entitled to significant weight in construing earlier, related legislation"); *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir. 1991) (same). Because this Court must presume that Congress was aware of its own prior laws and would not attempt to enact redundant or unnecessary legislation, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and because this Court cannot give a reading to statutory language that Congress considered and rejected, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), this Court cannot accept the Seventh Circuit's and BATF's evaluation of the

agency's authority. *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946) (an administrative agency may not finally decide the limits of its statutory power; this is a judicial function).

In the Gun Control Act, Congress created a detailed and workable regulatory scheme which both provided the BATF with sufficient authority to regulate effectively the importation of firearms and ensured affected parties of clear notice of the legality of their conduct. The Seventh Circuit's judicial delegation of the authority to regulate the domestic sale of transfer of firearms contravenes congressional intent, disrupts Congress' carefully crafted regulatory scheme and deprives affected parties of constitutionally adequate notice of the parameters of the law and the agency's powers. Moreover, it is an unauthorized usurpation of congressional authority by the courts in violation of Article III of the Constitution. Review of the Seventh Circuit's decision is necessary to establish clearly the parameters of BATF authority under the Gun Control Act.

CONCLUSION

For all the foregoing reasons, petitioner F.J. Vollmer & Company respectfully requests that the Court grant its petition for writ of certiorari.

Dated: October 27, 1993

RESPECTFULLY SUBMITTED,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

F.J. VOLLMER & COMPANY, INC., and
Kenneth L. Nevius,
Defendants-Appellants.

Nos. 92-2713, 92-2322.

United States Court of Appeals,
Seventh Circuit.

Argued April 8, 1993.

Decided July 30, 1993.

1513 Frances C. Hulin, Asst. U.S. Atty. (argued), Danville, IL, for U.S. in No. 92-2322.

Tom Schanzle-Haskins (argued), Nathan P. Maddox, Giffin, Winning, Cohen & Bodewes, Springfield, IL, for Kenneth L. Nevius.

Frances C. Hulin, Asst. U.S. Atty. (argued), Danville, IL, Rodger A. Heaton, Asst. U.S. Atty. (argued), Springfield, IL, for U.S. in No. 92-2713.

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Before CUMMINGS and CUDAHY, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge.

In this direct criminal appeal, the corporate defendant and individual defendant challenge their convictions for conspiracy to defraud the United States and for mail fraud. The individual defendant also appeals his conviction for false statement. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and reverse and remand in part.

I.

A.

F.J. Vollmer & Company ("F.J. Vollmer") holds a federal firearms license, and eighty percent of its business is buying and selling firearms. Kenneth L. Nevius ("Nevius"), a Captain on full-time active duty in the Illinois National Guard, and F.J. Vollmer were charged by indictment [FN1] with conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (Count 1), and mail fraud in violation of 18 U.S.C. § 1341 (Counts 14, 15, 16, 17 and 18). Nevius was also charged with making a false statement in violation of 18 U.S.C. § 1001 (Count 5). [FN2] All of the charges arose from the defendants' participation in the purchase and resale of Steyr AUG-SA rifles from Gun South, Inc. ("GSI"), a firearms importer.

FN1. The original indictment was filed on November 6, 1991. R.1. A superseding indictment was filed on December 4, 1991. R.17. For purposes of this opinion, we refer to the superseding indictment simply as the "indictment."

FN2. The defendants were also charged in other counts in the indictment, but those counts are not at issue in this appeal. The other counts that charged Nevius with federal crimes were dismissed pursuant to a plea agreement, and F.J. Vollmer was acquitted of the other charges against it. The indictment also charged Robert W. Vollmer, a corporate agent of F.J. Vollmer, with conspiracy and mail fraud. However, the jury acquitted him of all counts, and this appeal raises no issue with regard to him.

Nevius entered a conditional plea of guilty to Counts 1, 5, and 18, reserving the right to appeal the district court's denial of his motion to dismiss the indictment. Following a jury trial, Robert Vollmer was acquitted of all counts against him. F.J. Vollmer was acquitted of two counts of mail fraud, but found guilty of three counts of mail fraud and one count of conspiracy. F.J. Vollmer filed motions for judgment of acquittal or, in the alternative, for a new trial. The district court denied these motions. 792 F. Supp. 616.

B.

The Secretary of the Treasury, Nicholas Brady, acting through the Bureau of Alcohol, ***1514** Tobacco and Firearms ("BATF"), imposed a temporary ban on the importation of various semi-automatic rifles, including the Steyr AUG-SA. At that time, GSI held valid BATF permits for the importation of Steyr AUG-SA rifles and had already remitted payment to the manufacturer for over 1,000 rifles. When the Steyr AUG-SA rifles arrived in the United States, however, they were seized by the United States Customs Service.

GS1 filed suit against the Secretary of the Treasury in the Northern District of Alabama, seeking to enjoin the government from interfering with the delivery of the firearms. The district court granted the injunctions. *Gun South, Inc. v. Brady*, 711 F. Supp. 1054 (N.D.Ala.1989). On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the district court's order, finding that BATF was acting within its authority in imposing the temporary import ban. *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989).

Following the Eleventh Circuit's decision, the import ban on Steyr AUG-SA rifles became permanent. The ban bars private parties from importing Steyr AUG-SA rifles. Government agencies such as the National Guard remain free to import the rifles for their official use. 18 U.S.C. § 925(a)(1). Once a government agency lawfully imports a firearm under section 925(a)(1), the agency is not required to retain the firearm for any specific period of time, and the agency remains free to resell it to third parties.

On remand from the Eleventh Circuit, GSI and BATF entered into a voluntary settlement agreement pursuant to Fed. R. Civ. P. 41(a)(1)(ii). This agreement was reduced to a "Stipulation and Order" entered by the Alabama district court. Under the terms of the agreement, GSI took possession of the rifles and agreed to sell the firearms only to law enforcement officers or agencies after it obtained advanced written permission from BATF for each sale. To obtain that approval, each prospective purchaser had to submit a purchase order certifying that the rifle would be used in the officer's official duties and that the rifle was not being purchased for purposes of transfer or resale. A supervisory official also had to certify that the law enforcement officer could use the rifle in connection with his or her official duties and that the agency's policies allowed officers to carry and use personally owned firearms.

C.

In the summer of 1990, Nevius saw a GSI advertisement in the Shotgun News, offering Steyr AUG-SA rifles for sale to law enforcement personnel at a police of $1,380. He also saw F.J. Vollmer's advertisement, which stated that it would pay $2,200 for new Steyr AUG-SA rifles. Nevius then contacted GSI and confirmed that as a military officer he was eligible to purchase a Steyr AUG-SA rifle.

Nevius obtained an information packet from GSI setting forth formats for the various documents required to accompany a purchase order. Nevius prepared the necessary correspondence on his National Guard unit's stationery to purchase two Steyr AUG-SA rifles, including a signed statement that the firearms were being purchased in connection with his official duties and not for the purpose of resale. He then obtained the required supervisory certification from a superior officer and ordered the rifles using funds from his savings account. Upon receiving the rifles, Nevius took them to F.J. Vollmer and sold them.

A few weeks later, Nevius put together a second transaction, again for two rifles. Nevius asked Sergeant James McCabe, one of his subordinates, to sign the necessary purchase order. Nevius

signed the supervisory certification himself and again withdrew money from his savings account to finance the purchase.

Several months later, Nevius arranged another purchase, this time for eight rifles. Because there was a limit of two rifles per purchaser, Nevius approached four subordinates to sign the purchase orders. All four agreed and signed statements that the firearms were being purchased in connection with their official duties and not for resale. In exchange for their signatures, Nevius agreed to pay each of them either $100 or $200. (Tr. 345). To finance the transaction, ***1515** Nevius borrowed money from the First National Bank of Taylorville, using an automobile as collateral.

Over the next seven months, Nevius put together the documentation for five more transactions, following the same format. In all, Nevius acquired a total of 60 Steyr AUG-SA assault rifles and 11 Steyr AUG-SA rifle components known as special receivers. The receivers were classified as assault rifles and were also subject to the ban. All the assault rifles and receivers, save one Steyr AUG-SA rifle that Nevius retained for his personal collection, were delivered to F.J. Vollmer.

In the final transaction, Nevius ordered fourteen rifles. After Nevius picked up the packages at the United Parcel Service ("UPS") office, he was approached by BATF agents. The agents questioned him first at the UPS office and then at his home. They seized the rifles and receivers just delivered as well as the Steyr AUG-SA rifle from Nevius' personal collection.

Two days later, a BATF agent came to Nevius' home, and Nevius agreed to cooperate with BATF. While the agent was with him at his home, Nevius called Robert Vollmer and made arrangements to deliver the fourteen rifles and seven receivers. Both the telephone conversation and the subsequent delivery were recorded by BATF agents. This delivery took place during regular business hours and the tape recording reflects conversation between Nevius and F.J. Vollmer employees about the possibility of "getting into trouble".

Nevius and F.J. Vollmer both filed motions to dismiss the indictment (R. 29, 32), which the district court denied. Nevius

then entered a conditional plea of guilty to Count 1 (conspiracy), Count 5 (false statement) and Count 18 (mail fraud) under which Nevius reserved the right to appeal the denial of his motion to dismiss the indictment.

The jury acquitted Robert Vollmer, the only agent of F.J. Vollmer prosecuted, of all six counts against him and acquitted the corporation of the mail fraud counts arising from two of the transactions. F.J. Vollmer was found guilty of mail fraud on three counts and of conspiracy to defraud the United States. Following the return of the verdicts, the court did not immediately accept them, and counsel for F.J. Vollmer requested that the jury be polled. However, after an exchange regarding a motion for acquittal, the district court dismissed the jury without polling it.

On appeal, F.J. Vollmer raises seven issues, the first three of which Nevius adopts. F.J. Vollmer argues: (1) that the district court erred in imposing criminal liability solely on the basis of a civil settlement agreement; (2) that the BATF exceeded its authority when it entered the settlement agreement; (3) that the convictions are based on a de facto agency rule that was not promulgated in compliance with the Administrative Procedures Act (APA); (4) that the government failed to allege or prove that the conspiracy interfered with a lawful government function; (5) that the government failed to allege or prove that the mail fraud deprived the government of a property right; (6) that the district court deprived F.J. Vollmer of its Sixth Amendment right to a unanimous verdict by failing to poll the jury; and (7) that the district court erred in excluding evidence under Federal Rule of Evidence 608(b). In addition, Nevius argues that his conviction must be reversed because the indictment was insufficient as a matter of law to allege conspiracy to defraud the United States, mail fraud and false statement. We affirm in part, reverse in part, and reverse and remand in part.

II.

[1] We may easily dispose of the arguments that the convictions are based on the violation of a settlement agreement and that the convictions are based on rules promulgated in violation of the APA. F.J. Vollmer and Nevius were not convicted of violating a

settlement agreement. They were both charged with and convicted of violating 18 U.S.C. §§ 371 and 1341, which prohibit conspiring to defraud the United States or an agency thereof and mail fraud. In addition, Nevius was charged with and convicted of making a false statement in violation of 18 U.S.C. § 1001. The indictment and jury instructions specifically stated the elements of ***1516** these federal crimes. At no time did the government allege or argue that F.J. Vollmer and Nevius should be convicted for violating a settlement agreement. Further, because the convictions are not based on the violation of the settlement agreement, the defendants' argument that the settlement agreement constitutes an improperly promulgated de facto substantive agency rule is irrelevant. Accordingly, we need not consider whether the settlement agreement was promulgated in accordance with the Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.* Thus, we consider the next argument; whether BATF had authority to regulate the transfer of an assault rifle from GSI to Nevius.

[2] This is apparently a question of first impression in this circuit, and we conclude that the BATF's exercise of authority was properly within its purview. F.J. Vollmer and Nevius argue that Congress has given BATF no authority to regulate domestic sales of firearms. They conclude that the rifles were imported once GSI took possession of them; thus, the settlement agreement regulates the domestic sale of firearms. Under this argument, therefore, both the settlement agreement and BATF's limitations on the sales of Steyr AUG-SA rifles by GSI exceed the authority granted BATF by Congress. Although the defendants' argument seems persuasive on its face, we agree with other courts that have considered the issue that BATF's authority extends to the first domestic sale of a firearm imported for government use.

The importation of firearms into the United States is governed by §§ 922 and 925 of the Gun Control Act of 1968, 18 U.S.C. §§ 921-929. [FN3] Section 922(l) broadly prohibits the importation of all firearms into the United States except as provided in § 925(d). [FN4] However, federal, state or local agencies may import firearms pursuant to § 925(a)(1) which provides that the prohibition of § 922(l):

FN3. Control over the importation of firearms vests in the Secretary of the Treasury, who has delegated the authority to the Director of BATF. See Treasury Department Order No. 120-01 (formerly No. 221), 37 Fed. Reg. 11,696 (June 10, 1972), and 27 C.F.R. § 178.112.

FN4. Section 925(d)(3) permits importation of firearms that are particularly suitable for or readily adaptable to sporting purposes. Prior to March 14, 1989, Steyr AUG-SA rifles were importable pursuant to this exception. After this date, the Director of BATF declared that Steyr AUG-SA rifles were no longer considered suitable for sporting purposes.

shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any state or any department, agency or political subdivision thereof. 18 U.S.C. § 925(a)(1). We conclude that this language grants BATF authority to regulate the transfer of a firearm from an importer to the law enforcement agency for which the firearm was imported. For purposes of this opinion, we refer to this as a "first sale."

[3] A common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them. *Indianapolis Power and Light Co. v. Interstate Commerce Comm'n.*, 687 F.2d 1098, 1101 (7th Cir. 1982). Further, as the Third Circuit so aptly noted, "[w]e agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean." *United States v. Lanni*, 466 F.2d 1102, 1109 (3rd Cir. 1972). In order for § 925(a)(1) to have meaning, some authority must exist to ensure that the exception to § 922(1) is employed only by governments or their agencies. Thus, BATF must have the authority to require truthful statements about the purpose for the purchase of weapons. As we cannot impute to Congress the intent to allow firearms purchasers to lie, we conclude that BATF has the authority to regulate "first sales" pursuant to § 925(a)(1).

This conclusion is supported by the importation regulations set forth at 27 C.F.R. § 178. All importations of firearms into the United States must be approved by the Director of BATF. 27 C.F.R. § 178.112. Furthermore, firearms may be imported for a ***1517** governmental department or agency and "may be released from Customs custody upon a showing that the firearm ... is being imported or brought into the United States by or for such a governmental entity." 27 C.F.R. § 178.115(b). Likewise, the BATF notes in ATF Ruling 80-8 that "[§ 925(a)(1)] was not intended and may not be used as a vehicle by which unimportable firearms can be introduced into ordinary commercial channels in the United States." 1980-2 ALCOHOL, TOBACCO and FIREARMS QUARTERLY BULLETIN 20. These regulations indicate that BATF relies upon truthful statements when allowing importation for a governmental entity or agency. Finally, we note that other courts support our conclusion that BATF has the authority to ensure that firearms imported for governmental agencies are truly used for official purposes. See *United States v. Goodman*, 639 F. Supp. 802 (M.D. Pa.1986); *United States v. Mastro*, 570 F. Supp. 1388 (E.D. Pa.1983).

[4] F.J. Vollmer and Nevius contend that our determination that BATF has authority to regulate first sales does not end our inquiry regarding the proper scope of BATF's authority. They contend that GSI did not import the Steyr AUG-SA rifles pursuant to § 925(a)(1); it imported them pursuant to a voluntary settlement agreement. They argue that the Secretary of Treasury had no authority to circumvent the normal procedures for importing firearms. *Century Arms, Inc. v. Kennedy*, 323 F. Supp. 1002, 1011 (D. Vt.1971) (district court held that by barring importation of the firearms, the Secretary was "refusing to grant an exemption which he had no authority to grant.") (emphasis added). This leads the defendants to conclude that the settlement agreement, because it allowed importation of firearms in a manner outside the normal procedures, is illegal and of no effect. Since BATF thus acted outside its authority to regulate the sale, defendants argue that their convictions should be reversed.

The government points out that regulations promulgated under 18 U.S.C. § 926 allow alternate methods for gaining BATF

approval for the importation of firearms under § 925. The Director may approve an alternate method or procedure, subject to stated conditions, when it is found that: (1) Good cause is shown for the use of an alternate method or procedure; (2) The alternate method or procedure is within the purpose of, and consistent with the effect intended by, the specifically prescribed method or procedure and that the alternate method or procedure and that is substantially equivalent to that specifically prescribed method or procedure; and (3) The alternate method or procedure will not be contrary to any provision of law and will not result in an increase in cost to the Government or hinder the effective administration of [this import regulation]. 27 C.F.R. § 178.22.

F.J. Vollmer in its reply brief then argues that BATF did not follow this alternate procedure. It concludes that because BATF did not follow its own procedure, the settlement agreement is illegal and of no effect. [FN5] Even if it were appropriate for us to do so, we could not decide this issue because we do not have a record before us to make this determination. This narrow issue was not discussed in the motions to dismiss the indictment, nor was it brought up before the district court by either party. It is clear from the Stipulation and Order entered pursuant to the settlement agreement (R. 29, Ex. 2) that BATF believed that it was acting within its authority under § 925(a)(1) in entering the settlement agreement, and it believed that this statutory provision controlled these sales. F.J. Vollmer did not contend that BATF was acting outside its own regulations for alternate procedures until this appeal. We will not, therefore, decide this question, and we conclude that for purposes of this ***1518** case, BATF was acting within its legislative grant of authority.

FN5. *See, United States v. Nixon*, 418 U.S. 683, 695-96, 94 S.Ct. 3090, 3101, 41 L.Ed.2d 1039 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 545, 79 S. Ct. 968, 975, 3 L.Ed.2d 1012 (1959); *Frisby v. United States Dept. of Housing & Urban Dev.*, 755 F.2d 1052, 1055 (3rd Cir.1985); *Kelly v. Railroad Retirement Board*, 625 F.2d 486, 492 (3rd Cir. 1980); *United States v. Jones*, 368 F.2d 795 (2nd Cir. 1966).

III.

[5] Nevius entered a conditional plea of guilty, reserving the right to appeal the denial of his motion to dismiss the indictment. He alleges that the indictment is insufficient to charge conspiracy to defraud the United States, mail fraud, and false statement. He argues that the conspiracy conviction must be reversed because the indictment failed to allege that the conspiracy interfered with a lawful government function as required by *Dennis v. United States*, 384 U.S. 855, 861, 86 S. Ct. 1840, 1844, 16 L.Ed.2d 973 (1966). He next argues that the mail fraud count failed to allege that the scheme to defraud deprived the government of a property right as required by *McNally v. United States*, 483 U.S. 350, 360, 107 S. Ct. 2875, 2881, 97 L.Ed.2d 292 (1987). Finally, Nevius argues that the indictment was insufficient to charge false statement because the statements did not pertain to a matter "within the jurisdiction" of the Bureau of Alcohol, Tobacco & Firearms. An indictment is sufficient if it: (1) states all the elements of the offense charged; (2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense; and (3) enables the defendant to plead the judgment as a bar to later prosecution for the same offense. *United States v. James*, 923 F.2d 1261, 1265 (7th Cir.1991) (citing cases).

[6][7] We address Nevius' claim with regard to the false statement charges first. Nevius contends that the statements did not pertain to a matter "within the jurisdiction" of the Bureau of Alcohol, Tobacco & Firearms. The false statement statute, 18 U.S.C. § 1001, imposes penalties on one who makes a statement that was false, was material, was made knowingly and willfully and was made in a matter within the jurisdiction of any department or agency of the United States. The issue of jurisdiction in the context of a violation of § 1001 is a question of law, and a department or agency has jurisdiction only when it has the power to exercise authority in a particular situation. *United States v. Rodgers*, 466 U.S. 475, 479, 104 S. Ct. 1942, 1946, 80 L.Ed.2d 492 (1984).

Nevius argues that BATF lacked the power to regulate the sales of Steyr AUG-SA rifles from GSI to Nevius because BATF

does not have the authority to regulate domestic sales of firearms. However, we resolved this issue in our earlier discussion, when we concluded that BATF was acting within its proper jurisdiction in regulating "first sales". Therefore, Nevius' conviction for false statement is affirmed.

Federal Rule of Criminal Procedure 12(b)(2) requires that a defendant must raise any objection to the indictment prior to trial. Without objection, the "indictment should 'be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted.'" *James*, 923 F.2d at 1266 (quoting *United States v. Gironda*, 758 F.2d 1201, 1210 (7th Cir.), *cert. denied*, 474 U.S. 1004, 106 S. Ct. 523, 88 L.Ed.2d 456 (1985)).

[8] Nevius objected to the sufficiency of the indictment to charge conspiracy and mail fraud, but he did not do so on all the grounds alleged here. In his motion to the district court, he argued that the indictment was insufficient because BATF acted without authority and because the settlement agreement between BATF and GSI was a rule promulgated in violation of the APA. He did not argue that the indictment was insufficient on the basis of Dennis or McNally. [FN6] Therefore, we will reverse as to Nevius only if the indictment is so defective that no reasonable construction charges conspiracy to defraud or mail fraud.

> FN6. The closest that Nevius came to arguing that the indictment was insufficient on the grounds of Dennis and McNally was at page 12 of his motion to dismiss. There he argued that a prosecution for conspiracy to defraud the government would lie only if the purpose of the conspiracy was to defeat the lawful function of the government. However, instead of arguing that the indictment was legally insufficient because it did not allege interference with a lawful government function, Nevius argued that the BATF was not acting lawfully in regulating the weapons in this case. R. 29 at 12.

***1519** F.J. Vollmer did object to the indictment on the basis of Dennis and McNally. Therefore, we will uphold the indictment with regard to F.J. Vollmer if it stated the elements, informed F.J.

Vollmer of the nature of the charge and enabled F.J. Vollmer to plead the judgment as a bar to later prosecution *James*, 923 F.2d at 1265. Also, because F.J. Vollmer's conviction rests upon a jury verdict, F.J. Vollmer challenges both the sufficiency of the indictment and the sufficiency of the evidence on the conspiracy count and the mail fraud counts. When considering a sufficiency of the evidence challenge, we "review all the evidence and all the reasonable inferences that can be drawn from the evidence in the light most favorable to the government.... We will overturn a verdict only when the record is devoid of any evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt." *United States v. Durrive*, 902 F.2d 1221, 1223 (7th Cir. 1990) (quotations and citations omitted).

[9] Keeping in mind the standards set forth above, we first consider whether the indictment was sufficient to allege a conspiracy to defraud the United States. The defendants were charged under 18 U.S.C. § 371, which is a broad criminal statute that prohibits conspiracies to "defraud the United States, or any agency thereof in any manner or for any purpose." The Supreme Court has held that the conspiracy to defraud element of 18 U.S.C. § 371 encompasses only conspiracies in which the defendants intended either to cause the government property or pecuniary loss or interfere with or obstruct a lawful government function. *Hammerschmidt v. United States*, 265 U.S. 182, 185, 44 S. Ct. 511, 511, 68 L.Ed. 968 (1924); *Dennis v. United States*, 384 U.S. 855, 861, 86 S. Ct. 1840, 1844, 16 L.Ed.2d 973 (1966). It is conceded that the government did not pursue conspiracy convictions on the basis of property or pecuniary loss. Therefore, the conspiracy convictions can stand only if the conspiracy interfered with a lawful government function.

The defendants argue first that BATF was not performing a legitimate government function. As we discussed fully earlier in this opinion, BATF was acting within its authority in regulating the first sale by GSI. Therefore, we move on to the defendants' second argument; which is that the indictment did not state and the government did not prove interference with a lawful government function. We conclude after reviewing the indictment and the record

as a whole that the government alleged and proved interference with a lawful government function.

In *Dennis*, the defendants, officers of the International Union of Nine, Mill and Smelter Workers, were prosecuted for conspiring to fraudulently obtain the services of the National Labor Relations Board (NLRB) on behalf of a union by filing false Communist affidavits. On review, the Supreme Court considered whether the indictment was sufficient to state the offense of conspiracy to defraud the United States. The defendants argued that on the basis of *Hammerschmidt v. United States*, 265 U.S. 182, 44 S. Ct. 511, 68 L.Ed. 968 (1924), the indictment was insufficient because it did not allege interference with a lawful government function. The basis for this argument was that the NLRB was required to certify any union whose officers filed non-Communist affidavits without regard to the veracity of the affidavits. The Court decided that if the indictment reflects the essence of the alleged offense, the indictment will be upheld. The Court stated: The facts are, according to the indictment, that petitioners and their co-conspirators could not have obtained the Board's services and facilities without filing non-Communist affidavits; that the affidavits were submitted as part of a scheme to induce the Board to act; that the Board acted in reliance upon the fact that affidavits were filed; and that these affidavits were false. Within the meaning of § 371, this was a conspiracy to defraud the United States or an agency thereof. *Dennis*, 384 U.S. at 862, 86 S. Ct. at 1844.

In *United States v. Haga*, 821 F.2d 1036, 1041 (5th Cir. 1987), the Fifth Circuit noted that it is "not altogether clear whether a 'conspiracy to defraud' indictment must specifically allege that the conspiracy had as its object interfering with a particular, specific governmental function ...." Fortunately, ***1520** we need not decide this difficult question because the indictment at issue in this case included language expressly naming the governmental agency. The indictment indicated that the conspiracy actively interfered with the agency's specific function in a definite manner by contravening the normal requirements for the procurement of Steyr AUG-SA rifles. In Count I, the indictment alleged that: Beginning about June 1990 and continuing through September 1991, in the Central District of Illinois, Kenneth L. Nevius, F.J. Vollmer and Company, Inc., Robert

W. Vollmer, James B. McCabe and other persons known to the grand jury conspired together and with each other to defraud the United States of America and the Bureau of Alcohol, Tobacco and Firearms (ATF) by providing false and fraudulent documents to the Bureau of Alcohol, Tobacco and Firearms for the purpose of obtaining Steyr AUG-SA assault rifles in contravention of the requirements for sale of such weapons and for the purpose of resale in general commerce. Indictment, R. 17 at 3. As long as the indictment charges a conspiracy "showing ... more than inadvertent contact with a governmental agency or incidental infringement of government regulations," it is sufficient to charge the essence of the criminal offense. *Haga*, 821 F.2d at 1041. That test is met in this case. The indictment stated that false documents were given to BATF in contravention of the normal requirement. The indictment also made clear that BATF would not release the weapons unless it received certification that the weapons were not being purchased for purposes of resale. Further, the indictment stated that GSI could not sell the weapons without BATF's express written permission. The facts as stated in the indictment accordingly indicate more than inadvertent contact with a government agency and more than incidental infringement of that agency's function. Therefore, we hold that the indictment was sufficient as a matter of law to charge a conspiracy to defraud the United States.

F.J. Vollmer also challenges the sufficiency of the evidence on the basis that the government did not prove that the conspiracy interfered with a lawful government function. We affirm on this issue as well. Carmen Lewis, chief of the firearm and explosive imports branch of BATF, testified that BATF would not approve these sales without the proper certification, and that BATF relied on the veracity of the certifications in approving the sales of Steyr AUG-SA assault rifles by GSI. (Tr. 259-70). Furthermore, the jury was instructed that the government had to prove beyond a reasonable doubt each element alleged in the indictment. Therefore, the jury must have concluded that the government proved beyond a reasonable doubt that F.J. Vollmer conspired to provide false and fraudulent statements to BATF in contravention of the requirements for purchasing Steyr AUG-SA assault rifles. The evidence shows

interference with a lawful government function and was sufficient for the jury to find guilt beyond a reasonable doubt.

[10] Nevius and F.J. Vollmer argue that the indictment was also insufficient to charge mail fraud because it did not allege that the government had a property interest in the guns as is required by *McNally v. United States*, 483 U.S. 350, 360, 107 S. Ct. 2875, 2881, 97 L.Ed.2d 292 (1987). On the same basis, F.J. Vollmer argues further that even if the indictment was sufficient, the evidence was insufficient to prove guilt beyond a reasonable doubt of mail fraud.

McNally requires that the government allege and prove as an element of the offense of mail fraud that the defendant deprived the victim of a property right, *Id.* at 359-61, 107 S. Ct. at 2881-82. This principle holds true when the government is the victim of the alleged scheme to defraud because "any benefit which the Government derives from the [mail fraud] statute must be limited to the Government's interests as property holder". *McNally*, 483 U.S. at 358-59 n.8, 107 S. Ct. at 2880-81 n.8.

In this case, the government did not allege in the indictment, present evidence at trial, nor was the jury instructed on the deprivation of a property right. On appeal, the government argues that it held a joint ownership interest in the Steyr AUG-SA rifles ***1521** with GSI. The government argues that its right to control the disposition of the firearms is a property interest and that it was deprived of this interest by Nevius' and F.J. Vollmer's mail fraud. This argument fails.

It is well established that the government's regulatory interests are not protected by the mail fraud statute. *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992); *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991) (government's interest in issuing licenses is regulatory and licenses are not property for purposes of *McNally*); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (government has no property interest in licenses and permits); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (government has no property interest in licenses); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (same); *United States v. Evans*, 844 F.2d 36, (2nd Cir. 1988) (government's

interest in regulation of foreign resales of firearms is regulatory interest, not property interest); *United States v. Murphy*, 836 F.2d 248, 251 (6th Cir. 1988), *cert. denied*, 488 U.S. 924, 109 S.Ct. 307, 102 L.Ed.2d 325 (1988) (government has no property interest in licenses and certifications). In *Bruchhausen*, the alleged victims were manufacturers of military equipment and technology. They sold technology to Bruchhausen on his representation that it would remain in the United States, when in fact, Bruchhausen was selling the technology to Soviet bloc countries. The government argued that the manufacturer's interest in controlling the ultimate disposition of its property was a property interest for purposes of the statute. The Ninth Circuit held that this interest could not be characterized as a property interest for purposes of the wire fraud statute. *Bruchhausen*, 977 F.2d at 468.

The property interest alleged here is quite similar to that alleged in *Bruchhausen*, and we conclude that the government's interest in the Steyr AUG-SA rifles is not one that can be characterized as a property interest for purposes of *McNally*. In *Bruchhausen*, the manufacturer's interest in property it no longer owned was not a sufficient property interest for purposes of convicting for mail or wire fraud. In this case, the government contends that its interest in property it never owned is a property interest because it has a degree of "control" over the disposition of that property. BATF "controls" the importation of all firearms to a certain extent because firearms cannot be imported without a license from BATF. 18 U.S.C. § 922. However, one would hardly say that BATF therefore has a property interest in all firearms imported into the United States. BATF's right to control the disposition of the Steyr AUG-SA rifles derives from its legislative grant of authority. Thus, BATF has a regulatory interest in the disposition of firearms, but its legislative grant of authority conveys no property interest. The indictment is insufficient, and it does not by any reasonable construction charge mail fraud. Therefore, despite Nevius' failure to object on these grounds specifically, we reverse his conviction for mail fraud. Likewise, we reverse F.J. Vollmer's mail fraud convictions because the indictment was insufficient and because the government's evidence was also insufficient to prove a property interest.

IV.

Finally, F.J. Vollmer argues that certain trial errors also merit reversal of its conviction. The corporation urges that the district court erred when it refused to admit testimony from Nevius' banker that Nevius told him his loans were for business equipment. Furthermore, F.J. Vollmer argues that the district court did not poll the jury as requested and therefore, the conviction must be reversed and remanded for a new trial.

[11][12] First, we consider the evidentiary question. Decisions regarding the admission of evidence are left to the district court's discretion, and we will reverse a ruling on the admissibility of evidence only upon an abuse of that discretion. *United States v. Allen*, 930 F.2d 1270, 1273 (7th Cir.1991). Here, the district court determined that the defendants could not question Tom Bolting, the loan officer at Nevius' bank, about the reason Nevius gave for needing the loans. Nevius had said during his testimony that no one asked for the purpose of the loans, and that he did not know why the loan applications stated that the purpose of the loans was ***1522** for business equipment. The district court reasoned that for purposes of Federal Rule of Evidence 608(b), this was extrinsic evidence of a specific instance of bad conduct designed to attack the credibility of Nevius. [FN7] Therefore the district court did not allow the testimony.

> FN7. Federal Rule of Evidence 608(b) provides in relevant part that, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence."

On appeal, F.J. Vollmer contends that this evidence was material and relevant to the corporation's guilt because it showed that Nevius went to the bank for loans instead of borrowing the money from the corporation. It argues that this evidence tends to prove that F.J. Vollmer did not enter into an agreement with Nevius and that Nevius was acting independently.

The district court's ruling was not an abuse of discretion. F.J. Vollmer was permitted to question Nevius regarding his statements

to Bolfing about the purposes for the loans. Further, F.J. Vollmer was permitted to ask questions of Bolfing regarding the loans themselves. F.J. Vollmer made its point before the jury because Nevius testified that he did not ask F.J. Vollmer for an advance but rather went to the bank for a loan. During closing arguments counsel for F.J. Vollmer argued that this showed Nevius was acting independently. Because it had already made its point, the only other purpose F.J. Vollmer could have had for this evidence would have been to attack Nevius' credibility. Therefore, FRE 608(b) applies, and the evidence was properly excluded as a specific instance of misconduct offered to attack credibility.

The second trial error that F.J. Vollmer alleges was that, despite its timely request that the jury be polled, the district court dismissed the jury without polling it. The government urges, however, that F.J. Vollmer waived its right to poll the jury because it did not pursue its motion.

[13][14] A defendant has an "absolute right" to poll the jury to ensure the unanimity of the verdict against him. *Mackett v. United States*, 90 F.2d 462, 466 (7th Cir. 1937). Federal Rule of Criminal Procedure 31(d) codifies this right and provides: [w]hen a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged. The right to poll the jury is a substantial right. *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992). Failure to poll the jury upon a timely request is "per se error requiring reversal." *Government of Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3rd Cir. 1989).

[15] After the jury returned its verdicts, the district court asked if counsel wanted to be heard. Counsel for F.J. Vollmer asked that the jury be polled and the court inquired why counsel wanted a poll. At sidebar, the district court indicated that it thought the verdict of guilty was defective against F.J. Vollmer because the corporation could not be guilty if the corporate agent was acquitted. Counsel for F.J. Vollmer then moved for a judgment of acquittal or a judgment notwithstanding the verdict. The court reserved rul-

ing on that motion. Immediately after the reservation of ruling, the court dismissed the jury.

The government argues that by making and pursuing a motion for judgment of acquittal without pursuing the jury poll motion, F.J. Vollmer waived its right to poll the jury. The government relies on cases where courts have found waiver when pretrial motions were not pursued at trial. *United States v. Wilson*, 962 F.2d 621 (7th Cir. 1992) (pre-trial motion to suppress evidence); *United States v. Taglia*, 922 F.2d 413, 416 (7th Cir.), *cert. denied*, ____ U.S _____, 111 S. Ct. 2040, 114 L.Ed.2d 125 (1991) (pre-trial motion to sever). However, the government's reliance on these cases is misplaced because the transcript here does not indicate that F.J. Vollmer ever abandoned the motion to poll the jury. It simply requested another motion as well. The district court reserved ruling on ***1523** the motion for acquittal but did nothing with the motion to poll the jury. The very next thing the district court did after reserving ruling was dismiss the jury. The record indicates no opportunity for F.J. Vollmer to pursue its motion. The cases cited by the government involve pre-trial motions which were not renewed at trial. This situation is hardly comparable, and F.J. Vollmer cannot be said to have waived its motion when there was no opportunity to raise the issue again. Because the motion was timely and defendants enjoy an absolute "right to poll the jury ... unless it has been expressly waived," *Mackett v. United States*, 90 F.2d at 465, we must reverse F.J. Vollmer's conviction for conspiracy to defraud the United States and remand for a new trial.

V.

For the foregoing reasons, Nevius' convictions for conspiracy to defraud the United States and false statement are AFFIRMED. Nevius' and F.J. Vollmer's convictions for mail fraud are REVERSED, and F.J. Vollmer's conviction for conspiracy to defraud the United States is REVERSED and REMANDED for a new trial.

UNITED STATES of America, Plaintiff,

v.

Kenneth L. NEVIUS, F.J. Vollmer and Company, Inc., Robert W. Vollmer, Dana R. Hales and James B. McCabe, Defendants.

Cr. No. 91-20057.

United States District Court,
C.D. Illinois,
Danville Division.

March 5, 1992.

*610 Frances C. Hulin, Asst. U.S. Atty., Danville, Ill., for plaintiff.

Thomas Schanzle-Haskins, Springfield, Ill., for Nevius.

Rex Reu, Bloomington, Ill., for F.J. Vollmer & Co., Inc., and Robert W. Vollmer.

J. Steven Beckett, Urbana, Ill., for Hales.

James Valentine, Streamwood, Ill., for McCabe.

ORDER

BAKER, District Judge.

On November 6, 1991, a grand jury indicted Kenneth L. Nevius, F.J. Vollmer and Co., Inc. (F.J. Vollmer), Robert W. Vollmer, James B. McCabe and Dana R. Hales in an eighteen count indictment stemming from the sales of Steyr-Mannlicher model AUG-SA (Steyr AUG-SA) assault rifles. A grand jury issued a superseding indictment against the defendants on December 4, 1991. Since then all five defendants have moved to dismiss the

superseding indictment. (docket # 24, 29, 32) The United States has responded to the motions (docket # 42) and the defendants have requested leave to file reply briefs. The court granted Nevius's motion for leave to file a response (docket # 43) and now grants the motions for leave to file replies by F.J. Vollmer, Robert Vollmer, and Hales (docket # 44) and by McCabe. (docket # 45) For the reasons set forth below, the court denies the defendants' motions to dismiss the superseding indictment.

Superseding Indictment

Each of the counts in the indictment relates to the defendants' plans and efforts to purchase Steyr AUG-SA assault rifles from Gun South, Inc. (GSI) of Trussville, Alabama, an importer and seller of weapons, and to resell these assault rifles. During the time period covered in the indictment, each defendant held a position which is relevant to their attempts to obtain the assault rifles: Nevius was an officer in the Illinois Army National Guard (Guard); Hales was both an officer in the Guard and a federal firearms licensee; McCabe was a member of the Guard; F.J. Vollmer was a federal firearms licensee; and Robert Vollmer worked for F.J. Vollmer at its gun store. The superseding indictment charges the defendants with conspiracy to defraud the United States under 18 U.S.C. §§ 371 and 372, making false statements to BATF under 18 U.S.C. § 1001, and mail fraud under 18 U.S.C. § 1341 and 1342.

Specifically, count one charges that all the defendants, except Hales, violated 18 U.S.C. § 371 and 372 by conspiring to defraud the United States and the Bureau of Alcohol, Tobacco and Firearms (BATF) by providing false and fraudulent documents to BATF in an effort to obtain the Steyr AUG-SA assault rifles. Counts two through eight contain separate charges against McCabe, Hales, and Nevius for knowingly and willfully making false statements to the director of BATF that Steyr AUG-SA rifles were being purchased for official use of members of the Guard and not for resale. Under counts nine through thirteen, Hales and Nevius are indicted for mail fraud; the indictment states that Hales and Nevius caused GSI to use the mails to send checks to them as part of a scheme to defraud GSI. Finally, counts fourteen through eighteen charge

Nevius, F.J. Vollmer, and Robert Vollmer with mail fraud, alleging that, in executing a scheme to defraud the BATF for the purpose of obtaining Steyr AUG-SA rifles by false and fraudulent pretenses, they submitted orders to GSI through the mail.

Facts

The Steyr AUG-SA assault rifles which the defendants sought to obtain have been the subject of actions by the Secretary of the Treasury, the BATF, and the federal courts. In making the false statements charged in the indictment, the defendants were attempting to avoid restrictions on the importation and sale of these rifles resulting from a ban by the Secretary of the Treasury and from litigation in the Northern District of Alabama. The restrictions on Steyr AUG-SA assault rifles originated on March 14, 1989, when the Secretary of the Treasury Nicholas Brady imposed a temporary ban on the importation of several makes of semiautomatic assault weapons, including the Steyr AUG-SA rifles. The Secretary enacted this temporary ban pending a decision whether the weapons continued to be importable under section 925(d)(3) of the Gun Control Act (GCA), 18 U.S.C. § 925(d)(3), which allows the importation of firearms that are "recognized as particularly suitable for... sporting purposes." [FN1] On the same day, ***612** the BATF suspended action on pending applications for the importation of the temporarily banned weapons.

FN1. Section 922(1) of the Gun Control Act makes it unlawful for any person to import firearms into the United States except as provided in section 925(d). Section 922(1) states: Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter. 18 U.S.C. § 922(1). Section 925(d), therefore, supplies the only exceptions under which a private entity can import a firearm for private use. This section includes exceptions for firearms brought into the country for scientific or research purposes, as museum pieces, and for

> sporting purposes. Section 925(d)(3) specifically provides that the Secretary shall authorize importation of a firearm that: is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled. 18 U.S.C. § 925(d)(3).

Prior to the ban, the BATF had approved two permits for GSI to import Steyr AUG-SA semiautomatic rifles, and GSI had ordered 800 rifles. Once the BATF imposed the temporary ban, GSI asked BATF whether the ban included imports under previously approved permits. Although the BATF responded to GSI's inquiries by stating that the ban did not apply to firearms purchased under preexisting permits, the Customs Service interdicted GSI's shipment of rifles. The government refused to give custody of the guns to GSI unless GSI posted a bond guaranteeing that it would not resell the guns. See *Gun South*, Inc. v. Brady, 877 F.2d 858, 859-609 (11th Cir.1989) (for more detailed account of GSI's situation).

On March 30, 1989, GSI brought a suit against the Secretary of the Treasury in the Northern District of Alabama seeking to enjoin the government from interfering with the delivery of firearms imported under permits which BATF approved prior to the suspension. The district court issued a permanent injunction preventing the government from withholding the Steyr AUG-SA rifles from GSI. *Gun South, Inc. v. Brady*, 711 F.Supp. 1054 (N.D.Ala.1989). According to the district court, the government failed to demonstrate that the Steyr AUG-SA rifles were not particularly suitable for sporting purposes under section 925(d)(3). The court concluded that the rifles were importable under section 925(d)(3) and, therefore, that the Gun Control Act precluded the temporary ban. On appeal, the appellate court reversed the district court's decision, finding that the ban was within the authority of

the BATF. *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir.1989).

After the appellate decision, on October 13, 1989, the Director of the BATF determined that the Steyr AUG-SA assault rifles were not suitable for sporting purposes and, therefore, were not importable under any provision of section 925(d). This decision made the ban on Steyr AUG-SA rifles permanent. On November 9, 1989, the Northern District of Alabama entered a Stipulation and Order (Stipulation) dismissing the Guns South case. (See docket # 29, exhibit 2) This Stipulation allows GSI to import the Steyr AUG-SA assault rifles under the previously approved permits with certain restrictive conditions. The Stipulation specifically provides that GSI only can take possession of the rifles under the conditions stated in paragraph five of the stipulation or under any other means of lawful importation.

Under the conditions in paragraph five, GSI can transfer or sell the firearms to either: (i) a federal, state, or local law enforcement agency which certifies that the guns will be used in official duties; or (ii) an officer of a federal, state, or local law enforcement agency who certifies that he or she will use the gun in official duties. Individual law enforcement officers' purchase orders must also include a supervisor's certification, stating that the officer is authorized to carry a gun and is purchasing the Steyr AUG-SA for use in official duties. Attached to the Stipulation are sample certification forms and purchase orders for the purchasers to submit to the BATF.

The Stipulation also states that the BATF will either approve the sale or notify GSI that the sale does not comply with "the requirements of 18 U.S.C. § 925(a)(1) ***613** and/or the terms or this Stipulation...." Section 925(a)(1) provides that the prohibitions of the Gun Control Act: shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof. 18 U.S.C. § 925(a)(1). As the government points out in its brief, once the BATF prohibited the importation of Steyr AUG-

SA assault rifles under section 925(d)(3), section 925(a)(1) was the only provision under which these rifles could lawfully come into the country.

In the superseding indictment, McCabe, Nevius, and Hales, the officers and members of the Guard, are accused of submitting false certifications to the BATF stating that the Steyr AUG-SA rifles would be used for official purposes and not resold in violation of the Stipulation. The indictment charges that they intended to resell the weapons. F.J. Vollmer and Robert Vollmer allegedly agreed to purchase the rifles from the other defendants and resell them.

Motions to Dismiss the Superseding Indictment

In their motions to dismiss the superseding indictment, the defendants make two main arguments. First, the defendants argue that the BATF does not have the authority to regulate or restrict the sale of Steyr AUG-SA assault rifles as was done in the Stipulation. As support for this argument, the defendants discuss the legislative intent behind the Gun Control Act and assert that Congress clearly did not intend to give the BATF power to regulate domestic sales of weapons. Because BATF does not have authority to restrict firearms' sales, the defendants continue, the alleged false statements submitted in purchasing Steyr AUG-SA rifles cannot form the basis of an offense under 18 U.S.C. § 1001.

Section 1001, the federal false statement statute, imposes criminal penalties on who "(1) makes a statement that (2) was false, (3) was material, (4) was made knowingly and willfully, and (5) was made in a matter 'within the jurisdiction of any department or agency of the United States'" *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir.1983) (footnotes and citations omitted). BATF's lack of authority to regulate sales of firearms means that statements made in connection with domestic purchases of guns, as in this case, are not within the jurisdiction of the BATF. Therefore, the government cannot charge the defendants with a violation of section 1001 based on the facts in this case. Also, since the BATF does not have the authority to restrict the sale of firearms,

violations of the Stipulation cannot form the basis for the other charges in the indictment.

The defendants' second main argument is that, even if the BATF had the authority to regulate the sale of Steyr AUG-SA assault rifles, the attempt to regulate through the Stipulation in the Guns South case was invalid. Through the Stipulation, the BATF created rules without following the Administrative Procedure Act (APA) requirements or section 926 of the Gun Control Act. Because the Stipulation is not a properly promulgated rule or regulation, it can only bind the parties to the litigation. The court will discuss each of the defendants' arguments and the government's response.

i. BATF's Authority

[1] Because the BATF clearly has the authority to regulate the importation of firearms, [FN2] the defendants' first argument hinges on a distinction between regulating importation and regulating domestic sales of firearms. The government described the defendants' contentions accurately:

FN2. The Secretary of the Treasury has the power to enforce the provisions of the Gun Control Act. The Secretary has delegated this authority to the BATF. *Gun South, Inc. v. Brady*, 877 F.2d at 861 & n. 1 (citing 27 C.F.R. § 178.12 (1988)).

In a nutshell, all of the defendants argue that once [B]ATF permitted GSI to remove the nonsporting semiautomatic assault ***614** rifles from Customs custody, the firearms were imported and the import restrictions in section 925(a)(1) and (d) were either satisfied or never applied to these guns. Further, the defendants argue that any subsequent sale by GSI is not within [B]ATF's jurisdiction covering imports or the domestic sales of such firearms. The defendants, therefore, collectively conclude that all of the conspiracy, false statement and mail fraud charges pending against them should be dismissed. Government's Response at 10-11 (docket # 42). The defendants' distinction is misleading and their literal reading of the Gun Control Act would serve to eviscerate the statute.

Under section 925(a)(1), which authorizes the importation of weapons for the official use of federal, state, and local government entities, the BATF can regulate the first domestic sale of a firearm to ensure that it is imported for official government use. Any other interpretation of this section would permit government officers or departments to obtain weapons under section 925(a)(1) and then resell the firearms in the open market. Such a result would obviate the need for the narrow, specific exceptions to section 922(1) found in sections 925(a)(1) and (d). In a situation such as section 925(a)(1) or the Stipulation in this case, where the import regulation allows weapons into the country only for official government use, drawing a distinction between the importation and the first sale is misleading. As part of the importation regulation, the BATF has the authority to ensure that the firearm goes to an officer or department of a government.

Courts which have considered the meaning of section 925(a)(1) also have rejected a literal reading such as the defendants'. In *United States v. Goodman*, 639 F.Supp. 802 (M.D.Pa.1986), aff'd without opinion, 800 F.2d 1140 (3d Cir.1986), the defendant arranged for a police department to order restricted weapons under section 925(a)(1) which he, a federal firearms licensee, could pay for and resell. He argued that, if a firearm was shipped to a political subdivision, it did not have to be for the use of that entity to satisfy section 925(a)(1). *Goodman*, 639 F.Supp. at 810. The court stated: This is an absurd legal construction and would completely gut the Act which is intended to severely restrict the importation of foreign firearms.

. . . . .

We cannot ascribe to Congress the intent to allow firearms dealers to increase their commercial inventory of restricted-import weapons by the simple act of merely placing orders through police departments and having the weapons shipped to that entity which will only act as a conduit in transferring them to the real purchaser. Id. at 808, 810 (footnote omitted).

Similarly, in *United States v. Mastro*, 570 F.Supp. 1388 (E.D.Pa.1983), the defendant, a police chief, ordered weapons under

section 925(a)(1) and resold them to officers and private citizens. He argued that all the guns that he purchased were exempt from the Gun Control Act because they were shipped to a police department and that the exemption in section 925(a)(1) applies to the making of false statements in the acquisition of the guns and in the receipt and sale of the guns. *Mastro*, 570 F.Supp. at 1391. The court held that: The statute does not purport to exempt the making of false material statements in connection with the sales of firearms shipped to political subdivisions.... The Court cannot ascribe to Congress the intent to allow firearms purchasers to lie about their purchases so long as the gun is shipped to a state, agency, or political subdivision and can find no support for such an intent in § 925(a)(1). Id. at 1392; see *United States v. Brooks*, 611 F.2d 614, 617-18 (5th Cir.1980), *rev'd on other grounds*, *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984).

[2] Therefore, the defendants' argument that the BATF acted outside of their authority here because the Stipulation regulates the domestic sales of Steyr AUG-SA assault rifles fails. In addition, the court agrees with the government that the Stipulation, ***615** although creating a different procedure than section 925(a)(1), is within BATF's authority under this section; BATF, through the Stipulation, ensures that the Steyr AUG-SA assault rifles, which do not fall within a section 925(d) exception, cannot end up in regular commercial channels.

[3] Finally, because the BATF has the authority to regulate the transfer of Steyr AUG-SA assault rifles as it does through the Stipulation, the allegedly false statements were made in a matter within the jurisdiction of an agency of the United States. 18 U.S.C. § 1001; *Petullo*, 709 F.2d at 1180. Courts have held that the term jurisdiction, as used in section 1001, should not be given a narrow or technical meaning. *Bryson v. United States*, 396 U.S. 64, 70, 90 S.Ct. 355, 359, 24 L.Ed.2d 264 (1969); *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir.1978) ("jurisdiction" incorporates Congress' intent that the statute apply whenever false statements would result in perversion of authorized functions of department or agency), cert. denied, 440 U.S. 983, 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979). Instead, the statute covers all matters within the authority of an agency. *United States v. Rodgers*, 466 U.S. 475, 479, 104

S.Ct. 1942, 1946, 80 L.Ed.2d 492 (1984); see *United States v. Barber*, 881 F.2d 345, 350-51 (7th Cir.1989), cert. denied, 495 U.S. 922, 110 S.Ct. 1956, 109 L.Ed.2d 318 (1990); *United States v. Brack*, 747 F.2d 1142, 1151 (7th Cir.1984), cert. denied, 469 U.S. 1216, 105 S.Ct. 1193, 84 L.Ed.2d 339 (1985).

[4] A false statement must also be material to fall within the federal false statement statute. *Petullo*, 709 F.2d at 1180. Under section 1001, "the test for materiality is whether the false statement has a tendency to influence or is capable of influencing a federal agency." *Brack*, 747 F.2d at 1147; see *United States v. Brantley*, 786 F.2d 1322, 1326 (7th Cir.), cert. denied, 477 U.S. 908, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986). A false statement that a purchaser intended to use a firearm for official governmental purposes certainly would have a tendency to influence the BATF to allow importation and sale of that firearm. Therefore, the defendants cannot succeed in the motions to dismiss the indictment by arguing that the allegedly false statements were not material.

ii. Stipulation

[5] In their second main argument, the defendants' assert that the Stipulation amounts to a rule which was not promulgated in accordance with the APA requirements or with section 926 of the Gun Control Act. This argument is puzzling. Courts decide cases, set precedent, and interpret laws and regulations such as the Gun Control Act. Although courts' interpretations of laws often change the actions of an agency, courts do not make rules like an administrative agency. Through the Stipulation, the BATF and GSI agreed upon a procedure allowing GSI to import and sell the Steyr AUG-SA rifles after the Eleventh Circuit Court of Appeals found that the BATF could temporarily suspend the importation of the rifles. The Stipulation resolves a dispute between two parties and provides a way for GSI to obtain a limited number of rifles. In entering the Stipulation, the court was acting in its traditional role and not creating a rule.

[6][7] In addition, the APA imposes rulemaking requirements on agencies. In section 551(1) of the APA, the term agency is defined as not including Congress or the federal courts. 5 U.S.C.

§ 551(1)(A) and (B). Federal courts, therefore, are not subject to the provisions of the APA. See *In Re Fidelity Mortgage Investors*, 690 F.2d 35, 38 (2d Cir.1982), cert. denied, 462 U.S. 1106, 103 S.Ct. 2453, 77 L.Ed.2d 1333 (1983). Section 926 of the Gun Control Act restricts the Secretary of the Treasury's ability to prescribe rules under the Act. 18 U.S.C. § 926. Like the APA, the provisions of section 926 do not apply to a federal court's actions concerning the Gun Control Act.

iii. Additional Arguments

[8] The defendants make a few additional arguments in support of their motions to dismiss. McCabe asserts that the government's reference throughout the indictment ***616** to the firearms involved in this case as assault rifles is misleading and prejudicial. According to McCabe, the Steyr AUG-SA weapons are semiautomatic sporting rifles and not assault rifles. However, the BATF has determined that the Steyr AUG-SA firearms do not fit under the exception for sporting weapons. Absent compelling indications that the BATF's evaluation of the firearms is wrong, the court will defer to the BATF's interpretation, like the Eleventh Circuit Court of Appeals in *Gun South*, 877 F.2d at 864-5; see *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Based on the BATF's interpretation, the reference to the weapons as assault rifles was not misleading or prejudicial.

[9] Nevius argues that counts nine through thirteen are insufficient to charge mail fraud and, therefore, the court should dismiss them. These counts relate to Nevius' and Hale's alleged attempts to defraud GSI through participation in GSI s "Dealer Participation Program." The defendants claim that the indictment fails to allege fraud because it does not state that Hales did not assist in obtaining the weapons as required as part of the "Dealer Participation Program." However, the indictment does state that Nevius and Hales "devised and executed a scheme to defraud" and that the allegations in these counts are part of the scheme to defraud. The court finds that the allegations of a scheme to defraud and obtain money through false and fraudulent pretenses contained in these counts are sufficient to allege mail fraud.

IT IS THEREFORE ORDERED that the motion for leave to file a reply (docket # 44) by F.J. Vollmer, Robert Vollmer, and Dana Hales is GRANTED. James McCabe's motion for leave to file a reply (docket # 45) also is GRANTED.

IT IS FURTHER ORDERED that the defendants motions to dismiss the superseding indictment (docket #'s 24, 29 and 32) are DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GUN SOUTH, INC.

Plaintiff,

v.

NICHOLAS BRADY, SECRETARY OF THE TREASURY, and STEPHEN E. HIGGINS, DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, and WILLIAM VON RAAB, COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE,

Defendants.

Civil Action No. 89-AR0551-S

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their undersigned counsel, as follows:

1. The above-captioned action is hereby dismissed with prejudice pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, in accordance with the provisions of this Stipulation, each party violate the terms of this Stipulation, the aggrieved party may file a motion seeking to vacate the dismissal and enforce the terms of the Stipulation, each party to bear its own costs and attorney

fees. Should either party violate the terms of this Stipulation, the aggrieved party may file a motion seeking to vacate the dismissal and enforce the terms of the Stipulation.

2. The firearms at issue in this litigation are firearms enumerated on import permit nos. 88-13330 and 89-01918 which were ordered by plaintiff in reliance upon such permits and prior to ATF's suspension of such permits. The Bureau of Alcohol, Tobacco and Firearms shall promptly issue new import permits for the firearms at issue in this litigation, to the extent that such firearms have not already been imported. The new permits, which shall be issued for a period of 18 months, shall be specifically conditioned on companies by plaintiff Gun South, Inc. (GSI) with the terms of this Stipulation. Any other permits issued for the importation of the firearms at issue shall be governed by ATF's rules and procedures for the importation of firearms under 18 U.S.C. §§ 925(a)(1) and 925(d)(3) which are applicable at the time these permits are applied for. Defendants will permit plaintiff GSI to take possession of said firearms upon payment of all duties, storage costs (excluding storage costs incurred by plaintiffs subsequent to September 18, 1989), cartage charges, all applicable excise taxes, and any other charges which are normally applicable, and upon completion of routine Customs entry procedures, and subject to the conditions as set out below in this Stipulation.

3. For those firearms enumerated in the permits referenced in paragraph 2 above which are currently being held by the U.S. Customs Service in the United States, said firearms are to be released to plaintiff for sale or other transfer only in accordance with the provisions of paragraph 5 below or for lawful exportation.

4. For those firearms enumerated in the permits referenced in paragraph 2 which have not yet arrived in the United States, defendants shall permit plaintiff to import and take possession of said firearms for sale or other transfer only in accordance with paragraph 5 below or for lawful exportation.

5. GSI may not sell, transfer or otherwise dispose of any of the firearms enumerated in the permits referenced in paragraph 2 without the express written permission of the Director, Bureau of Alcohol, Tobacco and Firearms. Such approval shall be obtained

through the submission to the Director of either (i) a purchase order from or on behalf of a federal, state, or local law enforcement department or agency (including the U.S. Customs Service and U.S. Drug Enforcement Agency) substantially in the form as that attached hereto as Attachment 1; or (ii) a purchase order from or on behalf of any said entities substantially in the form as that attached hereto as Attachment 2-1 *and* certifications substantially in the form as attached hereto as Attachments 2-2 and 2-3. Upon receipt of properly executed documents referred to above (receipt by facsimile to be acceptable, followed by original), defendants shall within the usual processing time of 10-14 calendar days, approve such sales or transfers, or notify the plaintiff that the proposed sale or transfer does not comply with the requirements of 18 U.S.C. § 925(a)(1) and/or the terms of this Stipulation and the reasons for such determination, or notify the plaintiff that additional time is required to determine whether the proposed sale or transfer meets the requirements of 18 U.S.C. § 925(a)(1) and/or the terms of this Stipulation. In the event that GSI transfers or otherwise disposes of any of said firearms without receiving the written approval of the Director, ATF, GSI shall be liable for applicable civil and criminal penalties.

6. Nothing in this Stipulation shall serve to prohibit or restrict GSI from importing, selling or transferring firearms pursuant to, and in accordance with, the applicable laws of the United States and regulations and policy of the Bureau of Alcohol, Tobacco and Firearms.

Respectfully submitted,

STUART E. SCHIFFER
Acting Assistant Attorney General
Civil Division

FRANK W. DONALDSON
United States Attorney

/signed/
SANDRA M. SCHRAIBMAN

/signed/
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Attorney for Plaintiff

/signed/
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Washington, D.C. 20530
Telephone: (202) 633-3428

Counsel for Defendants

SO ORDERED:

Date: November 9, 1989

/signed/
UNITED STATES DISTRICT
JUDGE

PURCHASE ORDER

Please ship to the [insert name of law enforcement entity] _____ Steyr AUG-SA rifle(s). The rifle(s) will be used only in official duties with this department. This purchase is made with governmental or departmental funds and the Steyr AUG-SA(s) so ordered will become part of the department's firearms inventory.

_____

Department/Agency Head or
Authorized Supervisory Law
Enforcement Official

ATTACHMENT 1

PURCHASE ORDER

Please shop to the [insert name of law enforcement entity] for Officer(s) _____
Steyr AUG-SA rifle(s). The rifle(s) will be used by the officer(s) in official duties with this department.

_____
Department/Agency Head or
Authorized Supervisory Law
Enforcement Official

ATTACHMENT 2-1

CERTIFICATION OF SUPERVISORY LAW ENFORCEMENT OFFICIAL

To the Director, Bureau of Alcohol, Tobacco, and Firearms, I hereby certify as follows:

Officer _____ is a law enforcement office within this Department who is authorized to carry a firearm in connection with his/her official duties. Officer _____ is authorized to carry and use personally owned firearms in the performance of his/her official duties, and the firearm being purchased is for the performance of his/her official duties.

I am familiar with the circumstances surrounding the purchase of a Steyr AUG-SA by Officer _____. I am satisfied that the firearm is suitable for use in connection with official duties. I have been advised and assured that the firearm is in fact being purchased for use in connection with official duties and not for the purpose of transfer or resale.

It is the policy of the department that officers may carry and use personally owned firearms in connection with their official duties. Attached hereto is a copy of any written law, regulation, or guidelines (to the extent such law, regulation, or guidelines exist in written form) requiring, authorizing or permitting the use of personally owned firearms in connection with official duties.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.

_____

Department/Agency Head or
Authorized Supervisory Law
Enforcement Official

ATTACHMENT 2-3

CERTIFICATION OF PURCHASING OFFICER

To the Director, Bureau of the Alcohol, Tobacco and Firearms, I hereby certify as follows:

I am a law enforcement officer with the _____ Department/Agency. I hereby certify that I am purchasing a Steyr Aug-SA for use in connection with the performance of my official duties with the _____ Department/Agency. I further certify that such firearm is not being purchased for purposes of transfer or resale.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

(signature)

ATTACHMENT 2-4